

STATE OF VERMONT
PUBLIC SERVICE BOARD

Section 248a Order

Order implementing standards and procedures)
for issuance of a certificate of public good for)
communications facilities pursuant to 30 V.S.A.)
§ 248a)

Order entered: 8/14/2009

I. INTRODUCTION

The procedures governing Public Service Board ("Board") approval of communications facilities are set forth in 30 V.S.A. § 248a. During the 2009 legislative session, the General Assembly enacted into law Act No. 54 (H.313) amending the procedures set forth in 30 V.S.A. § 248a. 30 V.S.A. 248a(k) provides that the Board:

may issue rules or orders implementing and interpreting this section. In developing such rules or orders, the board shall seek to simplify the application and review process as appropriate

In order to implement the amended statute, on June 12, 2009, the Board circulated draft standards and procedures governing the application and issuance of a certificate of public good ("CPG") and requested comments.

The Board received comments and requests for clarification regarding the draft procedures from New Cingular Wireless PCS, LLC d/b/a AT&T Mobility ("AT&T"), Telephone Operating Company of Vermont, LLC, d/b/a FairPoint Communications ("FairPoint"), the Vermont Telecommunications Authority ("VTA"), and the Vermont Department of Public Service ("Department"). The comments are addressed below under the applicable sections of the standards and procedures.

II. DISCUSSION

Purpose and Applicability

This section of the standards and procedures states that they apply to "proposed construction or installation" of telecommunication facilities. AT&T argues that the section be clarified to state that the procedures apply to modifications to existing facilities as well. We agree that the section should be clarified to explicitly state that the procedures apply to modifications as consistent with statutory intent and other sections of the procedures.

Definitions

The draft procedures define "projects of limited size and scope" as "telecommunications facilities that: (a) consist of an attachment to an existing structure that does not increase the height or width of the existing structure by more than ten feet; and (b) projects that do not exceed 135 feet in height and do not include road building or other earth disturbance, other than temporary earth disturbance associated with construction activities, exceeding 100 square feet." The VTA and FairPoint suggest that the definition be further clarified to distinguish between temporary construction related activities and permanent development. The Department suggests increasing the height and width limit from 10 to 20 feet would be more appropriate given that increases of up to 12 feet are typically exempt from local zoning approval. AT&T requests clarifications related to modification of existing structures. AT&T also suggests that adding a definition of adjoining landowners would provide more clarity to the notice obligations. Based on the comments, we conclude that some further clarification and expansion of this section would be helpful and consistent with statutory intent, and we have revised the definitions accordingly.

Notice Requirements

The draft procedures require 45-day advance notice of the filing of a petition pursuant to § 248a and specifies the entities to be notified. The draft procedures also set forth the information to be provided in the notice. AT&T requests further clarification regarding the entities to be notified, specifically whether applicants are required to file two copies of the

application with the Department. AT&T also seeks clarification regarding the standard for meeting the notice requirement, and the treatment of significant changes to a project after the advance notice has been issued. The Department suggests that the Board require that the advance notice be acted upon within a reasonable time period. The Department also raises some general questions regarding the sufficiency of the notice content, but has not suggested revising the content.

With respect to the entities to be provided with advance notice, the procedures are based upon the statutory provisions at 248a(e) which specify the entities to be provided with advance notice, including both "the Commissioner of the Department of Public Service and its Director for Public Advocacy." Therefore, applicants must file two copies of the application with the Department. In determining whether an applicant has complied with the notice requirements, the Board will employ a "good faith" standard similar to Board Rule 5.402(B)(3). Significant changes to a proposed project, such as significant changes in size or location, will require a new 45-day advance notice to the required parties and we have revised the procedures to state this more clearly. We also agree with the Department that, in order to provide parties a reasonable timeframe in which to plan for the eventual filing of a petition it is appropriate to require the advance notice to be acted upon within a time certain, and have revised the procedures accordingly. With respect to the questions raised by the Department, we believe that the notice content requirements will provide sufficient detail about a proposed project to allow for adequate consideration of the potential impacts. We also note that should the Board determine that an applicant has provided insufficient information in the advance notice, the applicant may be required to provide additional notice and risk delaying the project.

Project Description

The draft procedures require the applicant to provide a site plan, elevation drawings, and coverage maps for the proposed project as part of the petition. The draft procedures also set forth several items that should be included as part of the site plan, including property boundaries, setback distances, and utility locations. AT&T argues that it should be sufficient for a design firm to use a tax map or aerial photos to create an estimate of these distances. The VTA argues

that the procedures should allow the Board to waive or modify project description requirements that may not be applicable to a specific project.

We agree with AT&T that approximate property boundaries, setback distances, and utility locations should provide sufficient information for our review of the petition and have revised the procedures accordingly. With respect to waivers of requirements, we clarify that the Board may, upon request of the applicant, waive or modify the requirements in this section that are not applicable to a specific project. Requests for waivers should be included with the petition and parties will have an opportunity to comment on the requests.

Local and Regional Plans

The draft procedures require applicants to provide the relevant portions of the Town Plans and Regional Plans in which the project is proposed to be located. AT&T requests clarification as to whether an applicant is required to submit copies of telecommunications zoning ordinances or bylaws.

We clarify that the procedures require submission of the relevant portions of municipal and regional plans only. Pursuant to § 248a(c)(2), municipal bodies are allowed to base their recommendations regarding a project on telecommunications ordinances or bylaws. However, the applicant is not required to anticipate these recommendations or submit the bylaws or ordinances with its petition.

Existing Permits

The draft procedures require applicants to provide copies of relevant local or state permits relating to the subject property and identify any conditions in the permits that may impact the development. AT&T requests clarification that applicants are not required to submit copies of zoning or building permits that do not contain conditions.

We clarify that applicants are required to submit only those permits that contain conditions relevant to the construction or installation of the proposed project.

III. CONCLUSION

Consistent with the determinations described above, we hereby adopt the following standards and procedures:

STANDARDS AND PROCEDURES

Purpose and Applicability: The purpose of these standards and procedures is to implement 30 V.S.A. § 248a ("Section 248a"). These standards and procedures are applicable to the proposed construction or installation of telecommunications facilities that are to be interconnected with other proposed or existing telecommunications facilities, and modifications to existing facilities. The Board may, upon request of the applicant and for good cause, waive or modify the standards and procedures with respect to a specific project; any such request shall be included with the application at the time the application is filed with the Board.

Definitions: "Telecommunications facility" means a communications facility that transmits and receives signals from a network used primarily for two-way communications for commercial, industrial, municipal, county, or state purposes, any associated support structure, and any ancillary improvements that are proposed for construction or installation of the facility and are primarily intended to serve the communications facilities or support structure.

"Projects of limited size and scope" means a telecommunications facility that: (a) consists of an attachment to an existing structure that does not increase the height or width of the existing structure by more than twenty feet; and (b) does not exceed 135 feet in height and does not include road building or other earth disturbance exceeding 100 square feet, other than a temporary road or earth disturbance associated with construction or installation activities.

"Landowner of record of property adjoining the project site" means a person who owns land in fee simple if that land will be crossed by a new private right-of-way or new utility easement to access and service the facility, shares a property boundary with the property upon which the facility will be located, or would share a boundary with the property upon which the facility will be located but for the presence of an intervening river, stream, public highway, or railroad line which shares a boundary or intersects the property.

Notice Requirements: The applicant must provide written notice, at least 45 days in advance of filing a § 248a application, to the following entities:

- (a) legislative bodies and municipal and regional planning commissions in the communities where the project will be located;
- (b) the Secretary of the Agency of Natural Resources;
- (c) the Commissioner of the Department of Public Service and its Director for Public Advocacy;
- (d) the landowners of record of property adjoining the project sites;
- (e) the Public Service Board.

The notice shall state that the applicant intends to make a § 248a application, identify the location of the telecommunications facility site(s) and provide a description of the proposed project(s). In addition, the notice must contain sufficient detail about the proposed project(s) to allow the parties receiving the notice to understand the impact of the project(s) on the interests of those parties. The notice shall provide contact information and state that recipients may file inquiries or comments with the applicant with respect to the project and that recipients will also have the opportunity to file comments with the Board once the application is filed. If the applicant has not filed an application for the project, pursuant to the filing requirements below, within 180 days of the date of the advance notice, the notice will be considered withdrawn.

If the applicant makes a substantial change to the proposed project, the applicant is required to provide notice of this change to all parties and entities already notified, including any newly affected adjoining property owners. For the purpose of this subsection, a substantial change is one that has the potential for significant impact with respect to any of the criteria applicable to the project, pursuant to section G of these standards.

Filing Requirements: Upon filing an original and three copies of the application with the Board, the applicant must also submit a copy of the application to the municipal planning commissions and regional planning commissions in the communities where the project is located, and to the Agency of Natural Resources. Two copies must be submitted to the Department of Public Service. Applicant shall also provide notice to the legislative bodies of the towns where the project(s) will be located and the landowners of record of property adjoining the project sites that the application has been filed with the Board.

The applicant shall ensure that the application filed includes testimony or exhibits addressing each of the areas listed below. Any witness sponsoring an exhibit or testimony must file a notarized affidavit stating that the information provided is accurate to the best of their knowledge and have personal knowledge of and be able to testify as to the validity of the information contained in the exhibit or testimony. The applicant shall file proposed findings of fact and a proposed certificate of public good with the application.

A. Applicant Name. The application shall include the name, contact information and a description of the company or person making the application.

B. Host landowners. The application shall include the names and addresses of the landowners on whose property the proposed facilities would be built.

C. Adjoining Landowners. The application shall include the names and addresses of all adjoining property owners. This information shall be obtained from the most recent version of the town's grand list.

D. Certification that Notice Requirements Have Been Met. The applicant must certify that it has complied with the advance notice requirements listed above.

E. Project Description**1. Site Plans**

The applicant must provide a site plan for each telecommunications facility project. A site plan shall include:

- (a) Proposed telecommunications facility locations and any incidental project features.
- (b) Approximate property boundaries and setback distances from those boundaries to the base(s) of the proposed support structure or existing structure and to the nearest corners of each of the related structures, and dimensions of all proposed improvements.
- (c) Proposed utilities, including approximate distance from source of power, sizes of service available and required, and approximate locations of any proposed utility or communication lines.
- (d) A description of any areas where vegetation is to be cleared or altered and a description of any proposed direct or indirect alterations of wetlands.
- (e) Detailed plans for any drainage of surface and/or sub-surface water and plans to control erosion and sedimentation both during construction and as a permanent measure.
- (f) Locations and specific descriptions of proposed screening, landscaping, ground cover, fencing, exterior lighting and signs.
- (g) Plans of any proposed access driveway, roadway or parking area at the facility site, including grading, drainage and traveled width, including a cross section of the access drive indicating the width, depth of gravel, paving or surface materials.
- (h) The latitude and longitude coordinates for each proposed telecommunications facility.

2. Elevation Drawings

- (a) For each proposed support structure, the applicant must provide elevation drawings.
- (b) The elevation drawings must be at appropriate scales but no smaller than 1"/20'.
- (c) The applicant must include two elevation drawings of the proposed support structures drawn at right angles to each other, showing the ground profile to at least 100 feet beyond the edge of any proposed clearing, and showing any guy wires or supports. The elevation drawing shall show all proposed antennas, including their location on the tower or other support structure and the height of the tower or other support structure above grade at the base, and describe the proposed finish of the tower or antenna.
- (d) For proposed towers, the elevation drawing shall indicate the relative height of the tower to the tops of surrounding trees as they presently exist.

(e) For proposed towers, the elevation drawing shall include a description of available space on the structure.

(f) Each plan sheet shall be clearly labeled with the project title, date, revision date(s), scale, and name of the person or firm that prepared the plan.

3. Coverage maps

The applicant shall provide a signal propagation study that clearly identifies the proposed coverage area of each communications service which will use the proposed telecommunication facilities at the completion of construction or installation of the facilities.

(a) For proposed telecommunications facilities that will extend the coverage area of an existing communications network, the coverage maps shall show the areas of existing coverage as well as the additional areas of coverage which the proposed facilities will enable.

(b) Radial plots shall be in bright colors, showing clear demarcations between signal strengths. For each antenna or antenna array, identify the power output of the antenna(s) and any other assumptions used to calculate the projected coverage area.

(c) Each plan sheet shall be clearly labeled with the project title, date, revision date(s), scale, and name of the person or firm that prepared the plan.

4. Project Scope and Narrative

The applicant shall provide a written narrative describing how the proposed facilities will be interconnected with other telecommunications facilities proposed or existing.

F. Public Good

The applicant must explain how the proposed project would promote the general good of the state consistent with 30 V.S.A. § 202c(b).

G. Environmental Criteria

1. The applicant must address each of the criteria set forth in 10 V.S.A. §§ 6086(a)(1) through (8) and (9)(k) and 1424a(d). To the extent that the proposal will create an adverse impact affecting any of these criteria, the applicant should describe what measures, if any, will be taken to minimize such impact.

2. Conditional waiver of criteria for projects of limited size and scope: Pursuant to 30 V.S.A. § 248a(k), for telecommunications facilities of limited size and scope, the Board conditionally waives the following criteria:

(a) All criteria under 30 V.S.A. § 248a(c)(1) are waived, with the exception of 10 V.S.A. § 6086(a) 8 (aesthetics, historic sites, rare and irreplaceable natural areas).

H. Local and Regional Plans

The applicant shall provide copies of the relevant sections of the Town Plans and Regional Plans in effect in the communities in which the proposed facilities will be located and describe how the project meets or complies with the land conservation measures in those plans. If the project does not so comply with a plan, the applicant should explain why not and demonstrate how the applicant has nevertheless given substantial deference to those measures or explain why there is good cause not to give substantial deference to those measures.

I. Existing Permits

The applicant must provide copies of any relevant local or state permits (including Act 250 and municipal zoning permits) that relate to the subject property and identify conditions in the permits that could impact the proposed development. If the proposed project would be inconsistent with any existing permit conditions, the applicant shall identify those conditions and explain why it is not feasible to harmonize the proposed project with those conditions. The applicant shall certify that it has not obtained or been denied a permit or permit amendment under the provisions of Title 24 or chapter 151 of Title 10 for the same or substantially the same project. An applicant may seek approval under Section 248a for a modification to a previously permitted project.

J. Completed Applications

Upon receiving an application under Section 248a, Board staff will review the application for completeness. If the application does not contain substantially comply with the application requirements set forth herein, the Clerk of the Board will inform the applicant of the deficiencies. Upon submission of all information necessary to address the deficiencies, the Clerk of the Board shall notify the applicant that the filing is complete.

K. Submission of Comments and Requests for Hearing

If any person wishes to submit comments to the Board concerning an application filed pursuant to Section 248a or request a hearing, such correspondence is due at the Board within 21 calendar days of the date that the application was submitted to the Board and all required parties.

L. Issuance of Decision

1. For projects of limited size and scope filed pursuant to 30 V.S.A. § 248a(k): Unless the Board determines that an application raises a substantial issue, it shall issue a final determination on an application within 45 days of its filing or, if the original filing was not complete, within 45 days of the date on which the Clerk of the Board notifies the applicant that the filing is complete. If the Board determines that an application raises a substantial issue, it shall issue a final determination on an application filed pursuant to this section within 90 days of its filing or, if the original filing was not complete, within 90 days of the date on which the Clerk of the Board notifies the applicant that the filing is complete.

2. For all other projects: Unless the Board determines that an application raises a significant issue, it shall issue a final determination on an application within 90 days of its filing or, if the original filing was not complete, within 90 days of the date on which the Clerk of the Board notifies the applicant that the filing is complete. If the Board determines that an application raises a significant issue, it shall issue a final determination on the application within 180 days of its filing or, if the original filing was not complete, within 180 days of the date on which the Clerk of the Board notifies the applicant that the filing is complete.

So ORDERED.

DATED at Montpelier, Vermont, this 14th day of August, 2009.

s/James Volz)
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s/David C. Coen)
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s/John D. Burke)

PUBLIC SERVICE
BOARD
OF VERMONT

OFFICE OF THE CLERK

Filed: August 14, 2009

Attest: s/Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us).